

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 122

ARMANDO PIEMONTE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Writ of Certiorari to the United States Court of
Appeals for the Seventh Circuit

Reply Brief of Appellant

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SUPPLEMENTARY STATEMENT OF FACTS.

The facts presented by the paragon show the relevant affirmative facts of record. But any inference that the trial court's written order of August 13, 1959, was seen by petitioner prior to his final appearance before the grand jury is not justified by those facts of record.

REPLY TO GOVERNMENT'S FIRST POINT:

The government contends the grant of immunity was sufficiently clear that the petitioner could not have failed to understand what was required of him.

At the same time, the government does not question our assertions that petitioner was in custody (R. 4); that the prosecutor was aware of the identity of appellant's lawyer (R. 5), and that the lawyer was not notified that appellant would be brought before the court for immunity processing (App. Br. 4). The government's assurance in this Court that all necessary clarification was extended to the petitioner, is hardly a substitute for effective assistance of counsel in the trial court.

The government concedes a substantial area of uncertainty in the trial court as to whether or not petitioner could properly refuse to testify (and therefore, could properly be immunized) on matters relating to the heroin involved in his earlier conviction (Govt. Br. 8, 13). But the government claims there was nothing for the petitioner to worry about. The situation was rectified when "... the prosecutor decided, in the interest of obtaining all the petitioner's testimony, to present an application [granting immunity as to everything]." (Govt. Br. 9).

But neither trial judge nor appellant could have understood the prosecutor to have been so motivated. For the trial court was informed by the prosecutor, not of a "decision" to sacrifice law to expediency, but rather, in the prosecutor's words:

"Based upon some recent decisions of the Appellate Court, so that the Court would not have any misconception of the idea of the Government counsel on this matter, we, too, think that the constitutional privilege claimed by the witness is well taken in [the matter of the heroin involved in his conviction]. (R. 14).

What the government really means is that the prosecutor "decided, in the interest of obtaining all of petitioner's testimony," to skirt the outer edges of the statute, circumvent orderly procedure, and disregard totally the rights of the petitioner.

The government further urges that the trial court was so patient with appellant as to give him every chance to avoid a sentence for contempt. But the point is not how patient the judge was, but whether petitioner was *guilty* of contempt. And this, in turn, depends upon whether or not the proceedings were characterized by such procedural regularity, that violation of the order to testify gave grounds for petitioner's imprisonment. The government persists in attempting to discuss the issue in terms of whether the petitioner was given ample opportunity to comply with the Court's order. Obviously, however, such an approach is meaningless, unless the order had a firm basis in law.

REPLY TO GOVERNMENT'S SECOND POINT:

We have urged the proposition that the trial court's oral order was legally ineffective to grant immunity, and that the written order does not afford a basis for contempt because it was not brought to petitioner's notice.

The government responds: the oral order was superfluous (Govt. Br. 18) while the written order, on the other hand, was unnecessary (Govt. Br. 19).

The government provides this Court an impressive list of the things that are unnecessary, according to the government, to the energizing of the immunity statute.

The government urges:

That the witness need not be represented by counsel when the coercive order is entered.

That it is not necessary that the order be clear, because if there is confusion, "petitioner's *lawyer* [can] question . . . the phraseology, or ask . . . for clarification." (Govt. Br. 18).

That it is not necessary that the trial court's oral order be precise, because the subsequent written order covers the subject and is controlling (Govt. Brief in opposition to petition for certiorari, p. 9).

That it is not necessary that the written order contain the findings required by the statute, because the oral order takes care of the matter (Govt. Br. 19.) Besides, the oral order was merely an "informal explanation to petitioner" (Brief in opposition to petition for certiorari, p. 8), and the written order was totally unnecessary (Govt. Br. 19).

The government concludes that it is "immaterial whether petitioner actually saw the written order, which simply confirmed the court's order as orally announced," (Govt. Br. 19); and the oral order was merely the instrumentality whereby "the judge explained the ruling to petitioner—in terms calculated to be intelligible to him . . ." (Govt. Br. 18):

Besides, says the government, the petitioner was inconsistent.

The government further urges that we were in error in suggesting that immunity cannot result from answers given to questions concerning dealings in marihuana. The government points out, correctly, that 18 U. S. C. 1406 authorizes a grant of immunity where a grand jury or court is investigating violation of certain statutes relating to marihuana.

Although the issue is but tangential to this case, we do not feel that the statutes support the government's argument on this point. Subsection (h) of Section 2 of the Narcotic Drugs Import and Export Act (21 U.S.C. 176a) provides that proof of possession of marihuana is sufficient to authorize conviction for smuggling marihuana. The statute also provides that "notwithstanding any other provision of law", violators of the statute shall be imprisoned for five years. (Emphasis supplied).

This section was enacted contemporaneously with 18 U. S. C. 1406. Giving expression to the presumed legislative intent that both sections be given effect, and in view of the command contained within 21 U. S. C. 176a that its penalties shall be imposed "notwithstanding any other provision of law", it is difficult to see how 18 U.S.C. 1406 can grant immunity from prosecution under 21 U. S. C. 176a. Whatever may have been the true Congressional intent, the language used could not be more clear.

REPLY TO GOVERNMENT'S THIRD POINT:

The government has evaded, not answered our contentions that appellant's indictment relieved him of liability for penalties for failure to testify before the grand jury which returned the indictment.

We contend that under no circumstances may a witness be punished for refusing to testify before the grand jury which ultimately indicts him.

The government answers that petitioner did not testify; therefore, he acquired no immunity; therefore, it was proper for the grand jury to indict him.

But we did not claim that petitioner was improperly indicted. Obviously no such contention is tenable within the limits of this proceeding. The issue is not present in this case, and the point has not been urged.

The issue is rather: May a witness be punished for refusal to testify before the grand jury which ultimately indicts him?

If no immunity statute had ever been enacted; and if the petitioner had not claimed self-incrimination, but had merely stood mute; then, the issue would be exactly the same as that here presented.

As our original brief demonstrated, without contradiction by the government, grand jury proceedings are a part of a criminal case against those indicted in those proceedings. And a defendant in a criminal case need not claim self-incrimination as grounds for refusal to testify. He need only refuse to testify, or remain silent. His right to do so is absolute. It is unaffected by any assigned grounds or lack thereof.

The government suggest that "there are several defects in this argument." (Govt. Br. 22). But the government does not suggest what those defects might be. Instead, the government lauds the concept of a statute which would compel the testimony of a defendant in a criminal case against himself—"Indeed, his is the very type of case at which the statute is directed." (Govt. Br. 23). There are, to be mild, several defects in *that* argument, not the least of which is that the statute does not pretend to require a defendant in a criminal case to become a witness therein.

In this aspect, the police and prosecutive agencies stand where they have always stood. They may not at once prosecute a citizen for a substantive offense, and punish him for his refusal to cooperate in that prosecution. Save a few significant exceptions (*cf. Powell v. United States*, D.C. Cir. 1955, 226 F. 2d 269, 274, no serious attempt to do it has been made, and such attempts as have been made have been rebuffed by the courts. See, e.g., *United States v. Lawn*, D.C.N.Y. 1953, 115 F. Supp. 674, 677.

CONCLUSION.

For the reasons expressed in our various pleadings in this Court, we pray that the judgment be reversed.

Respectfully submitted,

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